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No. 701

IN THE

Supreme Court of the United States

October Term, 1962

ERNEST KLEIN,

Petitioner,

vs.

WALSTON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ERNEST KLEIN,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

Ernest Klein of the City of New York prays that a writ of certiorari issue to review the order of the Court of Appeals entered on September 27, 1962.

Citation of Opinions Below

(See Appendix)

Jurisdiction

The final order of the Court of Appeals of the State of New York which is sought to be reviewed herein was made on September 27, 1962.

The jurisdiction of this Court is invoked under 28 U. S. Code, Sections 1257 and 2102(c) on the ground that the Court of Appeals of the State of New York erroneously concluded that it had no jurisdiction to entertain the appeal upon the ground that "the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution."

Questions Presented for Review

Whether or not the Court of Appeals of the State of New York correctly interpreted its powers under the Constitution of the State of New York and whether its erroneous interpretation of its powers constituted a violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Provisions of the Constitution of the United States in Point

"No State shall * * * deprive any person of life, liberty or property without due process of law * * *"

New York State Constitution Provision Involved

Article VI, sec. 7 of the Constitution of the State of New York defines the jurisdiction of the Court of Appeals (the highest Court of the State) as follows:

> "[Jurisdiction of court of appeals.] § 7. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.
>
> Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section:
>
> In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in

other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case

the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court of tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under subdivision (1) of this section where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding originally commenced in any court other than the supreme court, a county court, a surrogate's court, or the court of claims unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court

shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in subdivision (1) of this section wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by subdivision (6) of this section."

The Facts

In the Court below (the Supreme Court, New York County) the petitioner moved to vacate and set aside a consent and stipulation made by petitioner in open Court agreeing to the entry of two judgments against him amounting to some $13,000. The claim was made by the petitioner that the consent and stipulations were not voluntary but were induced by the atmosphere created by the Court by way of observations or remarks concerning some side issues not related to the merits of the claim upon which such judgments were sought (46-47).* The remarks in question dealt with a suggestion by the Court that "criminal acts had been committed" either by the petitioner or his son-in-law in connection with the verification of the answer and bill of particulars as well as signatures on certain cards when the brokerage account was opened by the petitioner with the respondent (48). These observations injected such overpowering fear in petitioner of criminal prosecutions against himself or his son-in-law that the petitioner lost all sense of control and particularly when petitioner was suffering from a physical

* References are to folios of the Trial Record.

disability, as testified to by a physician in open court (48-49).

These observations induced the petitioner's attorney to request the Court that he be permitted to withdraw from the case, the attorney having lost any interest or desire to continue as such and that he could not with propriety continue to represent petitioner in the case (50).

The affidavit of the petitioner which appears in folios 46-63 of the record gives a complete picture of the Court's conduct at the trial and shows the constant threat of criminal action against the petitioner and seriously prejudiced the rights of petitioner by an insinuation that he committed a crime, even to the extent of questioning the propriety of petitioner's attorney who was present at the trial and who then applied to withdraw from the case but the trial court denied his application and shortly thereafter said attorney actually did withdraw from the case. Further details of such action by the Court appear in folios 91-110 of the record.

The Court then, on May 22, 1961, vacated the consent to judgment and to the withdrawal of the answer, but on condition that the trial be set peremptorily for May 26, 1961 (4 days after the decision) as a "continued trial" before the same judge (433).

On the date in question, May 26, 1961, the petitioner appeared in Court with another attorney and requested the Court that "the case be remanded and adjourned" (490). The new attorney submitted two affidavits (485) stating that his appearance at the Court was limited to the extent that the consent judgment be set aside (504). The new attorney particularly insisted that if he were to act in full armor as an attorney he would have to have adequate preparation. He said: "It means that the man wants a trial and he's got to get a lawyer. I can't try a case in three days, a case that's been pending for a year. I wouldn't do it for Kingdom come, for anybody" (506).

The new attorney stated (516):

"I can't go into a case, Judge, at short notice. I'm sorry, Judge.

The Court: Well, it's just too bad.

Mr. Slater: It just certainly is too bad." (516)

* * *

"Mr. Slater: Judge, I want it understood that I'm not participating in any trial. Judge, I'm sorry." (520)

* * *

"The Court: You refuse to go forward?

Mr. Slater: I can't. I'm not ready." (521)

Argument Relied on for Allowance of Writ

(1)

The instant application presents for review the question whether the denial of a proper adjournment of the trial to prepare an adequate defense is a denial of "due process."

There is no such thing as a trial where a defendant is not given as much of a scope as the plaintiff would have in a similar action. Examination of the record as a whole clearly indicates extreme haste in seeking to obtain a judgment, lack of any opportunity to prepare an adequate defense and no opportunity whatever to offer any proof of the defendant's counterclaim. At this point the Court will observe that after an attorney has withdrawn from a case, and a new attorney applies to vacate a consent judgment and the court grants the application on condition that the trial "continue" before that court four days after granting such application and thus forcing new counsel to try a case on so inadequate preparation, clearly is a denial of due process. In the instant case it is also necessary to observe that all the papers relating to the case were retained by the withdrawing counsel and while they might have been made

available to the new counsel, nevertheless three days would have been wholly inadequate to make a study of same.

Evidently, in allowing a trial the Court recognized that the petitioner was entitled to a trial; nevertheless the conditions imposed were of such nature as to virtually deny a trial.

In the Brief submitted to the Court of Appeals reference was made to a number of decisions by the Court of the State of New York holding that where an attorney had withdrawn from the case it is the duty of the Court to continue the case a sufficient length of time to permit defendant to employ other counsel and to enable new counsel to investigate the case and defense.

(2)

The Court of Appeals of the State of New York was in error when it held that it had no jurisdiction to review the "Orders" appearing in the exhibits upon the ground that the Orders sought to be appealed from did not finally determine the action within the meaning of the Constitution of the State of New York. In this connection we must emphasize that the so-called Order of June 6, 1961 was definitely a Judgment and contained the statutory provision "that the plaintiff have execution thereof." It is also important to observe that while the Court of Appeals in its opinion listed two of the Orders as not appealable it did not specifically refer to the Order of June 6.

It is also obvious that no further recourse was left to the defendant after Judgment of June 6, 1961 and there could be no further appeal therefrom if the Court of Appeals should fail to grant it. By denying an appeal to it, it necessarily put a "finis" to this matter and there is no alternative left to the petitioner to enable him to try the issues in this case. This makes it absolutely mandatory for the Court of Appeals both in accordance with the Constitution of the State of New York as well as the Federal Constitution to take jurisdiction in this case, otherwise the defendant would clearly not be given due process as defined in our Constitution.

(3)

The fact that in similar cases, notably *Revona Realty Corp.* v. *Wasserman*, 5 N. Y. (2) 931, or *Murphy* v. *Kaplan*, 11 N. Y. (2) 1111, the New York Court of Appeals refused to entertain appeals claiming that the orders in question were intermediate and not final can have no application here. There might have been, in these cases, other remedies which could have been invoked and thus given the parties "due process." In the case before this Court the defendant has no other remedy. In this connection we quote from a recent decision of this Court:

> "Although fictions are sometimes invented in order to realize judicial conceptions of justice, the Courts are without power to define the constitutional guaranty of due process in terms of a fiction unrelated to reality, without exercising a power to remake constitutional provisions which the constitution has not given them." (*Curry* v. *McCanless*, 307 U. S. 357.)

(4)

The due process clause of the Fourteenth Amendment is not susceptible of reduction to a mathematical formula. (*Gibbs* v. *Burke*, 337 U. S. 773.)

In a recent decision of this Court (*Wolf* v. *Colorado*, 338 U. S. 25) the Court states:

> "Due process of law conveys neither formal nor narrow requirements; the real clue to the problem confronting the judiciary in the application of the due process clause is not to ask where the line is, once for all, to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of inclusion and exclusion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST KLEIN,
Petitioner.

MAXIMILIAN BADER,
Counsel.

December 15, 1962.

APPENDIX

STATE OF NEW YORK

IN THE COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of September, A. D., 1962.

Present. HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 618

WALSTON & CO., INC.,

Respondent,

vs.

ERNEST KLEIN,

Appellant.

(Action No. 1)

WALSTON & CO., INC.,

Plaintiff-Respondent,

vs.

HIRSCH L. SPIRA,

Defendant.

and

ERNEST KLEIN,

Appellant.

(Action No. 2)

A motion for leave to appeal to the Court of Appeals in the above causes having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the orders of the Appellate Division affirming the orders of May 22, 1961 and June 23, 1961, be and the same hereby is dismissed upon the ground that the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution, and it is

FURTHER ORDERED, that the said motion for leave to appeal be and the same hereby is, in all other respects, denied.

A copy

GEARON KIMBALL,
Deputy Clerk.